

Why Senate Democrats should vote for cloture on Gorsuch's nomination

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This week President Trump's nominee for the US Supreme Court, Judge Neil Gorsuch, is likely to be confirmed by the Senate – but with few Democratic votes. [John D. Rackey](#) and [P.C. Peay](#) write that despite their stated intention not to vote for cloture on debate over Gorsuch's nomination – which will likely lead Senate Republicans to invoke the “nuclear option” to remove the filibuster on Supreme Court nominations – Democratic Senators should vote to curtail debate, but then vote against Gorsuch's nomination. Such a move, they argue, would show Democratic Senators to be bipartisan while preserving the filibuster and maintaining Senate norms.



Confirmation of President Trump's Supreme Court nominee Neil Gorsuch will most likely happen later this week. Senate Majority Leader Mitch [McConnell \(R-KY\)](#) stated that should Democrats not provide the eight votes necessary to invoke cloture and head off a filibuster he will use the nuclear option to lower the cloture threshold to fifty-one Senators. This would effectively eliminate the current and future minority's ability to filibuster Supreme Court nominations, the same way former Majority Leader Harry Reid (D-NV) did to all other nominations below the Supreme Court level in 2013. So far four red-state Democrats, Sens. Bennet (CO), Donnelly (IN), Heitkamp (ND), and Manchin (WV) [will vote for cloture](#) on Gorsuch meaning four more Democrats would need to break party ranks in order for cloture to be invoked. Rumors have circulated Senator John McCain (R-AZ) had reached out to several Democrats to broker a deal that sees the confirmation of Gorsuch while protecting the filibuster for Supreme Court nominees.



Two questions immediately arise for Democrats who are still undecided on whether or not to filibuster Gorsuch, let alone vote to confirm him. One, what are the political ramifications of voting for cloture? Two, in working with McCain, what is the purpose of preserving the filibuster if it cannot be used?

Turning to the first question, four Democrats are still needed to invoke cloture; [there are nine Democrats](#) up for reelection in 2018 in states that Trump won this past November. While Trump's threats to campaign against Democrats and even conservative Republicans that block his agenda are becoming exceedingly weak, considering his approval ratings are approaching [historic lows](#), it's worth remembering that Senators Heitkamp, Donnelly, and Brown's 2012 elections were all decided by fewer than five percentage points; each of their states overwhelmingly voted for Trump in November.

What should be equally concerning for red-state Democrats and the DNC is the [liberal movement pressuring](#) Democratic Senators to engage in a full-throated filibuster or else they will be faced with a primary opponent. Here, the threat lies in the fact that many of these vulnerable Senators are in states with relatively strong progressive movements. Colorado, West Virginia, Indiana, and North Dakota were all states that favored Bernie Sanders in the 2016 Democratic Primary over Hillary Clinton – increasing the chances that they could potentially face challenges from the left should they not conform to progressive demands. The rise of rural conservative voters in the 2016 election could also prove problematic. Even if they survived potential primary challenges, expending efforts – both monetary and groundwork – addressing in-party challenges is likely to present complications in next year's midterm election. The concern is not for these nine Democrats not winning reelection, although that is of course a possibility. Should they fail in their primary challenge, there is also the chance that a more liberal Democratic candidate on the ballot in a red state could complicate the chances of winning next year. This could threaten the Democrats ability to win control of the chamber in a midterm election year which already sees them on the electoral back foot.

We would argue Democratic Senators who are in this situation should vote for cloture and against confirmation

rather than simply being pure obstructionists and voting against both. It [has been shown](#) that the public does not fully understand procedural votes and that even procedural votes as important as this will have little impact on election results. Additionally, these Senators can claim to be acting in a bipartisan manner to advance the nominee, while still standing up for their principles. This move is probably the best political move for red-state Democrats to fend off attacks from the right and the left. This solution helps vulnerable Democrats politically and preserves the filibuster of Supreme Court nominees for future minorities. This is the most responsible course of action given that Gorsuch's confirmation is now an eventuality that cannot be stopped.

The more interesting question is, what is the purpose of preserving the filibuster if it cannot be used? In reaching out to Democrats, Senator John McCain has said invoking cloture as it stands, at sixty votes, for Gorsuch will make sure that future minorities can filibuster a Supreme Court nominee under "extreme circumstances." The inherent problem here is, who determines an extreme circumstance which would determine the filibuster of a nominee appropriate? Using this logic, many liberal groups immediately [laughed and walked away](#) from McCain's proposal. But, there are broader implications beyond the loss of the Supreme Court filibuster that should be considered.

In the three years since Majority Leader Reid "went nuclear" on nominees below the Supreme Court scholars have been studying the Senate with more extreme scrutiny to determine the ramifications of that decision. There were initial payoffs for Democrats by allowing [more judicial nominees to be confirmed faster](#). However, this move broke with a century of norms related to how senators work with each other and operate within the chamber since the implementation of cloture under Rule XXII in 1917. Steven S. Smith in [The Senate Syndrome](#), describes how the 2013 nuclear option has eroded all institutional norms except for one, reciprocity. This "syndrome" as he describes it is the new instinct to "obstruct and restrict" that is now the assumed behavior among senators about how their colleagues will act. Should Mitch McConnell invoke the nuclear option Smith's syndrome dictates that the only response Democrats will have is to further obstruct and delay using [other procedural tactics](#).

Further obstruction could set the stage for nuking the filibuster on legislation. While there seems to be very little support for that at the moment, over the next year or so [that could change](#). Should Democrats successfully block key pieces of legislation and should Trump's approval rating increase Republican senators would feel pressure to go nuclear on legislation as well. Historically, outside pressure has had little influence on the Senate's decision to change its rules but in today's era of increased partisanship that norm is far from set in stone.

The point here is that Democrats should consider taking McCain's offer seriously, even if it means not being able to use the filibuster on Supreme Court nominees that they would be preserving. While it would be difficult to determine how McCain's proposal would functionally work, protecting the filibuster now also serves to protect the somewhat more important right to filibuster legislation. Likewise, it will prevent the further erosion of Senate norms and the permanence of Smith's syndrome of obstruction and restriction.

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